Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRANCIS B. KENDALL,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant who is charged in an indictment with conspiring to obstruct interstate commerce by extortion in violation of 18 U.S.C. §1951 has legally sufficient notice that the hearsay declarations of the payers of the extorted funds may be received in evidence against him as substantive proof of his participation in the conspiracy to extort, and whether such hearsay declarations may be properly received as substantive evidence of the conspiracy alleged?

2. Whether the co-conspirator exception to the hearsay rule, as codified in F.R. Evid., Rule 801(d)(2)(E) permits the receipt in evidence of declarations made by conspirators in a conspiracy not charged in the indictment as proof of the charged conspiracy?

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Table of Authorities iii

Opinion Below 1

Jurisdiction 2

Statutes and Rules Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

1. The decision of the United States Court of Appeals for the Seventh Circuit represents a misapplication of the co-conspirator exception to the hearsay rule and conflicts with the pronouncements of this Court that the declarations of a co-conspirator must be in furtherance of the conspiracy charged in order to be admissible against his partner 5

2. The decision of the United States Court of Appeals for the Seventh Circuit represents a significant enlargement in the reach of F.R. Evid. 801(d)(2)(E) which ought to be reviewed by this Court 8

Conclusion 9

Appendix

Opinion Below A-1

Judgment A-24

Amendment of Opinion Below A-25

Denial of Petition for Rehearing A-26

Superseding Indictment—Counts 1-3 ..... A-27

TABLE OF AUTHORITIES

CASES: PAGE

Anderson v. United States, 417 U.S. 211 (1974) 7

Krulewitch v. United States, 336 U.S. 440 (1949) 7

Russell v. United States, 369 U.S. 749 (1962) 7

United States v. Braasch, 505 F.2d 139 (7th Cir. 1974) *cert. den.* 421 U.S. 910 (1975) 6

United States v. Hall, 536 F.2d 313 (10th Cir. 1976). 6

United States v. Hathaway, 534 F.2d 386 (1st Cir. 1976), *cert. den.* 429 U.S. 819 (1976) 6

United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978) 6

FEDERAL STATUTES:

18 U.S.C. §1951 ..... 2, 3, 6

18 U.S.C. §1952 ..... 5, 6

18 U.S.C. §1961 5

28 U.S.C. §1254(1) 2

FEDERAL RULES:

F.R. Evid., Rule 801(d)(2)(E) 2, 5, 8

RULES OF COURT

Rule 20.1 of the Revised Rules of the United States Supreme Court 2

Rule 20.4 of the Revised Rules of the United States Supreme Court 2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Francis B. Kendall prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on November 23, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, entered on November 23, 1981, and amended by order of the court entered December 24, 1981, is set out in the Appendix at A-1. The order of the United States Court of Appeals for the Seventh Circuit denying the petition for rehearing and suggestion for rehearing *en banc*, entered on December 28, 1981, is set out in the Appendix at A-26.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was entered on November 23, 1981. Thereafter, on December 28, 1981, the United States Court of Appeals for the Seventh Circuit denied a timely petition for rehearing. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1). The timeliness of the petition for certiorari is governed by Rules 20.1 and 20.4 of the Revised Rules of the Supreme Court of the United States.

STATUTES AND RULES INVOLVED

This case involves the Hobbs Act, 18 U.S.C. §1951, which reads in pertinent part as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *
>
> This term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> * * *

It also involves Federal Rules of Evidence, Rule 801(d)(2)(E) which reads as follows:

> (d) Statements which are not hearsay. A statement is not hearsay if
>
> * * *

(2) Admission by party-opponent. The statement is offered against a party and is

* * *

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF CASE

Francis B. Kendall was charged in three counts of an eight-count superseding indictment returned in the United States District Court for the Southern District of Indiana on November 6, 1980 with offenses under the Hobbs Act, 18 U.S.C. §1951. (The three pertinent counts are set out in the Appendix, A-27). Count 1 charged Kendall and two other defendants with conspiring to obstruct interstate commerce by extortion; Counts 2 and 3 alleged extortions occurring on March 2 and March 7, 1979. Although the indictment alleged in Count 1 that the defendants "and others known and unknown to the Grand Jury" conspired to violate the Hobbs Act, and in Counts 2 and 3 that the defendant "Martin K. Edwards, with the aid of John L. Cline and Francis B. Kendall and others, known and unknown to the Grand Jury" committed substantive Hobbs Act offenses, the trial court refused to order the government to supply a bill of particulars identifying the other known co-conspirators and aiders and abettors.

The transactions which were the subject matter of the indictment involved payments by the Indiana Surety Agents Association, an organization of Indiana bail bondsmen, to Martin K. Edwards, a named defendant and President Pro Tempore of the Indiana Senate, to ensure his support for the passage or defeat of certain bills pending before the 1979 session of the Indiana General Assembly which would affect the bail bond industry.

John Cline, an employee of defendant Kendall, was originally charged as a defendant, but all charges against him were dismissed with prejudice prior to trial. The

evidence at trial tended to show that members of the executive committee of the Indiana Surety Agents Association collected funds which were converted to cash and then delivered to John Cline for delivery to Martin Edwards, pursuant to a payment schedule which Edwards laid out to Cline, which was based on the progress of the legislation in which the Indiana Surety Agents Association was interested.

The evidence showed that petitioner Kendall was not present at the time of any of the cash deliveries, and that he was, in fact in Florida during most of the 1979 legislative session. John Cline testified, however, that Kendall was aware of what was going on, and that on one occasion Cline delivered to Kendall $1000 in cash, which was half of a cash sum of $2000 which had been returned to him by Martin Edwards at the time of a cash payment to Edwards.

On March 5, 1979, after an initial delivery of $3000 in cash from Cline to Edwards, the officers of the Indiana Surety Agents Association met at an Indianapolis hotel. None of the three named defendants was present at the meeting. The meeting was tape-recorded by one of the participants. The tape-recording and a transcript thereof were admitted into evidence over the objection of the defendants as substantive evidence of the alleged Hobbs Act conspiracy.

The indictment alleged that the Indiana Surety Agents Association, its officers, members and agents were victims of the alleged Hobbs Act extortion. In arguing against the admissibility of the statements between and among the officers of the Indiana Surety Agents Association outside the presence of the defendants, defendant Kendall contended in the trial court and on appeal that such persons could not be co-conspirators in their own extortion. The trial court admitted the statements upon the apparent ground that a conspiracy-to-bribe was comprehended within the Hobbs Acts conspiracy-to-extort charged in the indictment.

On appeal, the Court of Appeals refused to consider whether or not the payer of moneys in an alleged Hobbs Act extortion was a chargeable Hobbs Act co-conspirator. Instead, it held that the members of the Indiana Surety Agents Association were participating in a separate conspiracy which was "factually intertwined" with the conspiracy with which defendant Kendall was charged, and that their statements in furtherance of that separate uncharged conspiracy were therefore admissible as substantive evidence of the Hobbs Act conspiracy with which Kendall was charged.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

1. The decision of the United States Court of Appeals for the Seventh Circuit represents a misapplication of the co-conspirator exception to the hearsay rule and conflicts with the pronouncements of this Court that the declarations of a co-conspirator must be in furtherance of the conspiracy charged in order to be admissible against his partner.

The Seventh Circuit held that defendant Kendall was a co-conspirator with members of the Indiana Agents Association in an uncharged conspiracy to bribe which could have been alleged as a violation of the ITAR statute (18 U.S.C. §1961) or the Travel Act (18 U.S.C. §1952). The Court of Appeals attached no significance to the fact that neither of those offenses was charged in the indictment, stating that such fact was significant "only if it compels the conclusion that defendant Kendall had legally insufficient notice that his alleged participation in a bribery scheme, along with ISAA members, would lead to the admissibility of the out-of-court declarations by the surety agents pursuant to rule 801(d)(2)(E)." The Court of Appeals then concluded that defendant Kendall had legally sufficient notice because "[b]ribery and extortion under the Hobbs Act are not mutually exclusive."

The cases upon which the Seventh Circuit relied for the

proposition that under the Hobbs Act, bribery and extortion are not mutually exclusive, are all cases in which it was unsuccessfully argued that the mere passive receipt of moneys by a public official could not constitute "extortion" under 18 U.S.C. §1951. Those cases all focus upon the culpability of the *recipient of the payment*, holding that where payments were induced by the belief of the payers that the public official, by virtue of his office, had the real or apparent power to accomplish the ends desired by the payers, then it made no difference whether, from the standpoint of the payers, the payments were more in the nature of bribery rather than extortion. See *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978); *United States v. Hathaway*, 534 F.2d 386 (1st Cir. 1976) *cert. den.* 429 U.S. 819; *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974) *cert. den.* 421 U.S. 910 (1975).

However, in those cases in which the government has chosen to charge both the payer and the recipient of money in the same indictment, the recipient has been charged with a Hobbs Act offense (18 U.S.C. §1951) and the payer with a Travel Act offense (18 U.S.C. §1952). See *United States v. Hathaway*, 534 F.2d 386 (1st Cir. 1976), *cert. den.* 429 U.S. 819 (1976); *United States v. Hall*, 536 F.2d 313 (10th Cir. 1976).

In the present case, petitioner Kendall was charged only with conspiring to *extort*, and aiding and abetting *extortion*, in violation of 18 U.S.C. §1951. Thus, he was apprised that the charge against him was to be bottomed on proof that he had explicitly or implicitly entered into an agreement with his co-defendants and acted in concert with them to extort moneys or to aid in the extortion of moneys from the officers and members of the Indiana Surety Agents Association. To the extent that the co-conspiration exception to the hearsay rule is based upon principles of agency, petitioner Kendall was advised that the conduct and declarations of his agents in furtherance of the alleged *extortion* could be used against him.

However, at trial, petitioner Kendall was confronted with an entirely different situation. The evidence presented by the government as to the declaration of the officers of the Indiana Surety Agents Association was deemed by the Court of Appeals to be in furtherance, not of the extortion alleged in the indictment, but of bribery not alleged in the indictment. Yet it was nonetheless received as substantive proof of the charged conspiracy to extort.

In addressing the co-conspirator exception to the hearsay rule, this court has on at least two occasions, announced the proposition that

> "...hearsay statements by some conspirators to be admissible against others, just be made in furtherance of the conspiracy *charged*..." (Emphasis supplied).
>
> *Krulewitch v. United States*, 336 U.S. 440, 443-44 (1949).

See also *Anderson v. United States*, 417 U.S. 211, 218-19, footnote 6 (1974).

In *Russell v. United States*, 369 U.S. 749 (1962) this Court reversed a conviction where the indictment failed adequately to apprise the defendant of the charges against him, observing that:

> [T]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the mind of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. 369 U.S. 770.

In the present case, it is unnecessary to 'guess what was in the mind of the grand jury.' The indictment makes that clear beyond question. The trial court's refusal to order the government to file a bill of particulars effectively insured that the defendant would not be informed that members of the Indiana Surety Agents Association were regarded as "co-conspirators." The admission of their hearsay declaration did, in fact, deprive defendant of a basic constitutional protection.

This court should grant the writ to review the conclusion and determination of the Court of Appeals that defendant Kendall had legally sufficient notice that evidence of the acts and declarations of the Indiana Surety Agents would be admissible against him as substantive evidence of the Hobbs Acts conspiracy charged in the indictment.

2. The decision of the United States Court of Appeals for the Seventh Circuit represents a significant enlargement in the reach of F.R.Evid. 801(d)(2)(E) which ought to be reviewed by this Court.

Rule 801(d)(2)(E) codifies the co-conspirator exception to the hearsay rule by removing from the definition of hearsay "a statement by a co-conspirator of a party during the course of and in furtherance of *the* conspiracy." (Emphasis supplied). It does violence to the meaning and intent of this rule to suggest, as the Seventh Circuit did in the present case, that "the conspiracy" can be anything other than "the [charged] conspiracy," or "the [alleged] conspiracy."

By permitting declarations made in furtherance of an uncharged conspiracy to be admitted as substantive evidence against alleged participants in the conspiracy specifically alleged in the indictment, the Seventh Circuit has significantly enlarged the scope and effect of F.R. Evid., 801(d)(2)(E). Such an enlargement ought not to be sanctioned without the full consideration of this Court.

CONCLUSION

Petitioner respectfully prays that a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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Appendix

APPENDIX

No. 81-1138
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS B. KENDALL,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Indiana.
No. IP 80-74-CR—**William E. Steckler**, *Chief District Judge.*

ARGUED SEPTEMBER 17, 1981—DECIDED NOVEMBER 23, 1981

Before PELL, *Circuit Judge*, FAIRCHILD, *Senior Circuit Judge*, and CUDAHY, *Circuit Judge.*

PELL, *Circuit Judge.* The appellant, Francis B. Kendall, was convicted following a jury trial on three counts of violating the Hobbs Act, 18 U.S.C. §1951 (1976). The first count alleged a conspiracy to obstruct interstate commerce by extortion. Counts 2 and 3 alleged extortions on March 2, 1979, and March 7, 1979, from the Indiana Surety Agents Association (ISAA). The principal issue on appeal is whether the trial court committed prejudicial error when it admitted evidence concerning conversations among members of the ISAA pursuant to rule 801(d)(2)(E) of the Federal Rules of Evidence.[1]

[1] Federal Rule of Evidence 801(d)(2)(E) provides:

(d) Statements which are not hearsay. A statement is not hearsay if—

....

(2) Admission by party-opponent. The statement is offered against a party and is...(E) a statement by a co-conspirator of a party during the course and in furtherance of conspiracy.

Except for its designation of co-conspirators' statements as "not hearsay," the rule codifies the common law co-conspirator exception to the hearsay rule. *United States v. Gil*, 604 F.2d 546, 548 (7th Cir. 1979).

Kendall raises three additional issues on appeal. First, he contends that the trial court abused its discretion in denying his motion for a bill of particulars identifying the known but unnamed co-conspirators. Second, the appellant contends that the evidence demonstrated the possibility of multiple conspiracies and that the judge below committed prejudicial error by not instructing the jury accordingly. Finally, Kendall maintains that the trial court committed prejudicial error in denying his motions for severance.

I. Facts

The ISAA was an organization of bail bondsmen in the State of Indiana. Its principal purpose was to lobby for legislation favorable to the bail bond industry. In late 1978, the ISAA was concerned about the possible enactment of legislation allowing a defendant to post ten percent of the amount of his bond with the court rather than requiring him to secure a corporate surety bond for the full amount of the bail. The pertinent legislation was embodied in Senate Bill 155, Senate Bill 256, and House Bill 1490, then pending before the First Regular Session of the 101st Indiana General Assembly.

Following the recommendation of an ISAA member, the ISAA president, Bruce Harris, got in touch with Francis Kendall in early 1979. Kendall subsequently indicated that his corporation, Capitol Business Systems (Capitol), would be willing to act as a "legislative director" for the ISAA for a fee of $12,000, payable at $1,000 per month. Capitol was to gather information useful in lobbying against the pending legislation. Kendall said that he was very close to the legislature. He introduced Harris to his business associate, John Cline. Cline was to handle the ISAA account because Kendall planned to be out of town for much of the legislative session. Harris paid Cline a $1,000 retainer in early February, 1979, although he declined to sign a written contract. Cline made various contacts on behalf of the ISAA after February 6, 1979. The contacts, which

included several conversations with Martin K. Edwards, President Pro Tempore of the Indiana Senate, were noted in Capitol's files, to which Kendall had access.

House Bill 1490 passed the House on January 31, 1979.[2] Cline testified that on March 1, 1979, Edwards phoned him and detailed a payment schedule "to get [House Bill 1490] handled." Edwards wanted $3,000 immediately, $5,000 when the bill came out of committee, $4,000 when it reached the Senate floor, and $15,000 when it went to the House.

Cline made contact with Harris. Various members of the ISAA delivered checks to Harris. On March 2, 1979, Cline delivered to Edwards the $3,000 that had been collected by Harris. On March 5, 1979, the officers of the ISAA met and agreed to raise funds and to make contributions themselves for the purpose of paying Edwards. This meeting was tape-recorded by Harris.

The bill came out of committee on March 6, 1979. It had been amended to require any cash deposit for bail to be equal to the full amount of the bail. On March 7, 1979, Cline delivered to Edwards the $5,000 that Harris had raised. Edwards returned $2,000 to Cline and, within the next two or three days, Cline delivered half of the $2,000 to Kendall. Cline told Kendall "how much was there and what it was for and where it came from."

On March 16, 1979, House Bill 1490 was amended so as to delete the amendment added in committee that was supported by the ISAA. The bill passed the Senate in its original form.

On March 26, 1979, officers of the ISAA met with Kendall and Cline at the offices of Capitol. The discussion

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[2] Senate Bills 155 and 256 had been referred to the Senate Judiciary Committee. Although the bills were heard by a subcommittee, the committee chairman declined to give the bills a hearing in the full committee.

included: (1) whether Capitol should be employed pursuant to a $1,000 per month contract to help with future legislative efforts; (2) whether $5,000 should be paid to Edwards to secure the appointment of a favorable study commission on bail bonding which might recommend legislation to the next session of the legislature; and (3) a general discussion of the money already paid to Edwards. The members decided not to sign the contract nor to make other payments.

Cline's next contact with Harris was on May 10, 1979, to discuss appointments to the study commission; however, the ISAA did not take any further action.

The original indictment charged Kendall and Cline each with three counts of violating the Hobbs Act, 18 U.S.C. §1951 (1976). Edwards was charged on the same three counts as well as four additional counts.[3]

Kendall filed a motion for a bill of particulars, seeking disclosure, *inter alia*, of the names of conspirators known to the grand jury but unnamed in the indictment. He also filed a motion for relief from prejudicial joinder. The Government responded to both motions on September 3, 1980. In response to the motion for a bill of particulars, the Government detailed materials which had been made available to the defendants pursuant to rule 16 of the Federal Rules of Criminal Procedure. The tape recording and transcript of the March 5, 1979 meeting were among the materials provided, the latter totalling over three hundred pages.

On October 13, 1980, the trial court denied the request for a bill of particulars. Kendall's motion for reconsideration was similarly denied on October 30, 1980. On October 16, 1980, the court granted the Government's motion to dismiss

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[3] The four additional counts against Edwards charged violations of 18 U.S.C. §§1623, 1505, & 1503.

all counts of the indictment as to Cline with prejudice. The court thereupon found Kendall's motion for severance to be moot.

The Grand Jury returned a superseding indictment on November 6, 1980. Six of the seven counts contained in the first indictment were repeated;[4] additionally, Edwards was charged with three counts of violating 26 U.S.C. §7206(a) (1976). Kendall's alternative motion for severance as to these three counts was granted the next day; however, his renewed motion to sever entirely his trial from that of Edwards was denied.

II. Federal Rule of Evidence 801(d)(2)(E)

Appellant Kendall contends that the trial court committed prejudicial error in admitting as substantive evidence of the conspiracy testimony about conversations among ISAA members. In particular, Kendall challenges the admission of a tape recording of the March 5, 1979 meeting, testimony by Delbert First concerning statements made by his brother, Robert First, and testimony by Harris as to a conversation he had with Cline on May 10, 1979. The appellant argues that it was legally impossible for the ISAA members to be co-conspirators under the Hobbs Act, 18 U.S.C. §1951 (1976), and therefore it was error for the court to admit the testimony pursuant to rule 801(d)(2)(E) of the Federal Rules of Evidence. Additionally, Kendall argues that testimony by Delbert First did not concern statements made in furtherance of the conspiracy and that the May 10, 1979 conversation between Cline and Harris occurred after the conspiracy had ended.

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[4] Count 7 of the original indictment, charging Edwards with attempting to obstruct an investigation by the F.B.I. in violation of 18 U.S.C. §1505 (1976), had been dismissed by the court on October 13, 1980, on motion of the defendant Edwards.

A. Legal Impossibility

The appellant reasons as follows: (1) the ISAA was the victim of the conspiracy;[5] (2) the intent and purpose of the Hobbs Act, 18 U.S.C. §1951 (1976), is to protect the victims of extortion regardless of whether they are "willing" victims; (3) because the ISAA was victim to the extortion, its members could not have been charged as Hobbs Act co-conspirators; and (4) therefore, conversations among ISAA members should not have been admitted as substantive evidence pursuant to Federal Rule of Evidence 801(d)(2)(E).

Kendall relies for support on cases decided under statutes other than the Hobbs Act which have held that the victim of the crime charged cannot be deemed a co-conspirator under the pertinent statute. *See United States v. Nasser*, 476 F.2d 1111 (7th Cir. 1973) (conspiracy to violate a conflict of interest statute, charged under 18 U.S.C. §207(a) (1976)), *Nigro v. United States*, 117 F.2d 624 (8th Cir. 1941) (conspiracy to sell, barter and exchange narcotics, charged under 26 U.S.C. §1044 (1976); *Gebardi v. United States*, 287 U.S. 112 (1932) (conspiracy in violation of the Mann Act, now codified at 18 U.S.C. §§2421-2424 (1976)).

We need not decide, however, whether the ISAA members and directors might have been charged with a Hobbs Act violation. This court has previously held that "conspiracy" as an evidentiary concept, embodied in rule 801(d)(2)(E), and "conspiracy" as a concept of substantive criminal law are not coterminous. *United States v. Gil*, 604 F.2d 546, 549-50 (7th Cir. 1979); *accord, United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977). To distinguish the two concepts, courts have referred to the evidentiary principle

[5] The indictment named as victims of the conspiracy the ISAA, its officers, members and agents.

as a "joint venture" exception, *United States v. Swainson*, 548 F.2d 657, 660 (6th Cir. 1977), *cert. denied*, 431 U.S. 937, or a "concert of action" exception, *United States v. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977).

In *Gil*, defendants Villegas and Gil were charged with distribution of heroin. Neither was charged with conspiracy. At trial, the district court judge found that the Government had established by a preponderance of independent evidence that a conspiracy existed, that Gil was a member of the conspiracy, and that various statements by Villegas were made during the course and in furtherance of the conspiracy. After thus properly applying the standard articulated by this court in *United States v. Santiago*, 582 F.2d 1128, 1134 (7th Cir. 1978), the trial judge admitted Villegas' statements against Gil, pursuant to rule 801(d)(2)(E).

Villegas was acquitted of the narcotics charge because he proved entrapment by the Government. A successful entrapment defense negates the existence of crime because the required mental state is absent when the criminal act is committed at the instigation of the Government. *Hampton v. United States*, 425 U.S. 484, 489 (1976). On appeal, Gil argued that he was entitled to a new trial without the use of Villegas' statements against him because no conspiracy could have existed. Because Villegas had been found innocent, only Gil could have been a conspirator; however, a conspiracy involving only one person is a legal impossibility.

After discussing the distinction between the substantive crime of conspiracy and rule 801(d)(2)(E), this court noted that Villegas' acquittal might "have some effect on whether Gil, Villegas' 'partner in crime,' could be tried for the substantive crime of conspiracy, but it has no relevance to the rationale behind Rule 801(d)(2)(E)." 604 F.2d at 550. The conviction of Gil was affirmed.

Gil establishes that the appellate court need not overturn a conviction arguably based in part on evidence introduced pursuant to the joint venture exception even if, at the time of appeal, it appears that any substantive charge of conspiracy might be a legal impossibility. In the instant case, appellant Kendall argues that it would be legally impossible to charge the ISAA directors, whose conversations were admitted pursuant to the co-conspirator exception, with conspiracy under the Hobbs Act, 18 U.S.C. §1951 (1976). In light of *Gil*, we are convinced that, even if such a substantive conspiracy charge were a legal impossibility, the trial court's reliance on rule 801(d)(2)(E) does not necessarily require us to overturn the conviction.

Several well-established judicial rules delineating the limits of the joint venture exception, besides the holding in *Gil*, are pertinent to the admissibility of the challenged declarations. An out-of-court statement is admissible pursuant to rule 801(d)(2)(E) if the judge finds by a preponderance of the evidence "that the declarant and defendant were members of a conspiracy at the time the hearsay statement was made, and that the statement was in furtherance of the conspiracy." *United States v. Santiago*, 582 F.2d 1128, 1134 (7th Cir. 1978); *accord, United States v. Medina-Herrera*, 606 F.2d 770, 773 (7th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980). If this standard is met, such an out-of-court statement is admissible even if there is no conspiracy charged.[6] The general rule requires only that

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[6] *E.g., United States v. Freeman*, 619 F.2d 1112, 1122 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1348 (1981); *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979); *United States v. Barnes*, 604 F.2d 121, 156 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); *United States v. Scavo*, 593 F.2d 837, 845 n.4 (8th Cir. 1979); *United States v. Durland*, 575 F.2d 1306, 1310 (10th Cir. 1978); *United States v. Weiner*, 578 F.2d 757, 768 (9th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 981; *United States v. Swainson*, 548 F.2d 657, 661 (6th Cir. 1977), *cert. denied*, 431 U.S. 937; *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977).

the conspiracy introduced into evidence by the Government be "factually intertwined" with the offense for which the defendant is being tried. *United States v. Lyles*, 593 F.2d 182, 194 (2d Cir. 1979), *cert. denied*, 444 U.S. 847.

In the case at bar, the trial judge made the findings required by *Santiago* and *Medina-Herrera* and only then admitted the challenged testimony pursuant to rule 801(d)(2)(E). Even if the appellant's theory that a Hobbs Act victim cannot be a co-conspirator as to his own extortion is correct, it does not appear from the record that the court below relied on such a theory. In fact, the appellant in his reply brief stated that the trial judge thought that the ISAA executive committee members who testified might be chargeable with a conspiracy to extort money from the ISAA membership as a whole.[7] The Government had strenuously argued that the conspiracy to extort included a conspiracy to bribe. At the time the trial court relied on the co-conspirator exception, therefore, it was far from certain that no conspiracy involving the testifying ISAA members could legally exist. The requirements of *Santiago* and *Medina-Herrera* were therefore met and this case is consistent with *Gil*.

We find strong support for the theory advanced by the Government at trial for admissibility of the testimony. *United States v. Hathaway*, 534 F.2d 386 (1st Cir. 1976), *cert. denied*, 429 U.S. 819, involved charged violations of both the Hobbs Act, 18 U.S.C. §1951 (1976), and the Travel Act, *id.* §1952 (1976). The extortion scheme involved payments by Graham to Baptista which were "laundered" through Hathaway. Baptista and Hathaway were both charged pursuant to 18 U.S.C. §§1951 & 1952 (1976).

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[7] Our review of the transcript leads us to conclude that insufficient evidence as to the required state of mind of the ISAA non-committee members exists to support this theory. That finding is not, however, dispositive because the ISAA committee members could have been charged with a conspiracy to bribe, *see infra*.

Graham was not charged with any violation. He testified under a grant of immunity.

Some of Graham's testimony was received pursuant to rule 801(d)(2)(E). 534 F.2d at 401. Apparently his testimony concerned actions by the defendants that were allegedly violative of the Hobbs Act as well as the bribery aspects of the scheme, which were charged under the Travel Act. *Id.* at 390. There is no indication whatsoever in *Hathaway* that the jury was limited to considering this testimony only in relation to the Travel Act charges.

Appellant Kendall states in his brief that "the court specifically charged the jury that Graham's interstate travel and use of the mails would sustain a conviction under *the Travel Act.* The *Hathaway* case does not support the proposition that a payer may be regarded as a Hobbs Act co-conspirator for evidentiary purposes." Kendall's observation as to the jury charge is correct. Further, nothing in *Hathaway* suggests that Graham would have been charged, but for the grant of immunity, with a Hobbs Act violation. Whether he could be deemed a Hobbs Act co-conspirator, however, is irrelevant to the evidentiary question. Because Graham was a co-conspirator for evidentiary purposes under the Travel Act, his testimony was admissible against the defendants regardless of whether it constituted proof of the Hobbs Act or Travel Act violations.

In the case at bar, various ISAA members might have been charged with use of interstate transportation in aid of racketeering, 18 U.S.C. §1961 (1976) (ITAR), or under the Travel Act, *id.* §1952 (1976). They were not charged because they were granted immunity,[8] just as Graham was in *Hathaway. Hathaway* is distinguishable from the instant case only in that Kendall was not charged under

[8] At least three ISAA members who testified, Harris, Lee, and Leslie, were granted immunity by the Government.

either section 1952 or section 1961 whereas Baptista and Hathaway were charged pursuant to the Travel Act as well as the Hobbs Act. This distinction is significant only if it compels the conclusion that defendant Kendall had legally insufficient notice that his alleged participation in a bribery scheme, along with ISAA members, would lead to the admissibility of out-of-court declarations by the surety agents pursuant to rule 801(d)(2)(E).

Bribery and extortion under the Hobbs Act are not mutually exclusive.[9] In this case, the alleged conspiracy to bribe was clearly "intertwined" with the extortion conspiracy charged, *see United States v. Lyles*, 593 F.2d 182, 194 (2d Cir. 1979), *cert. denied*, 444 U.S. 847. Kendall therefore had at least as much notice that the Government might seek to introduce evidence of the conspiracy pursuant to rule 801(d)(2)(E) as the defendants in those cases admitting such evidence where no conspiracy was charged. *E.g.*, *United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979).

Kendall had legally sufficient notice that his participation in a bribery scheme with ISAA members might lead to the introduction of evidence concerning conversations among ISAA members pursuant to the joint venture exception. The fact that ISAA members might not be chargeable under the Hobbs Act is irrelevant. The trial judge properly made the findings required by *Santiago* and *Medina-Herrera* and he did not err in admitting the testimony.

B. "In Furtherance of" the Conspiracy

Rule 801(d)(2)(E) requires that the declaration be made in furtherance of the conspiracy. The appellant contends that when Robert First told his brother, Delbert First,

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[9] *E.g.*, *United States v. Rabbit*, 583 F.2d 1014, 1026 (8th Cir. 1978); *United States v. Hathaway*, 534 F.2d 386, 393 (1st Cir. 1976); *cert. denied*, 429 U.S. 810; *United States v. Braasch*, 505 F.2d 139, 151 n.7 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

what had transpired at the March 5, 1979, and March 26, 1979, ISAA meetings, he was not furthering the conspiracy. The appellant characterizes the conversations between the brothers as "mere narrative" and likens the instant case to *United States v. Eubanks*, 591 F.2d 513 (9th Cir. 1979) (per curiam).

Eubanks involved a narcotics conspiracy. Gonzales, who was deceased at the time of trial, was a key member of that conspiracy. Gloria Baca, who had been Gonzales' common law wife, testified, and her testimony was admitted pursuant to the joint venture exception. The court found that the declarations made by Gonzales to Baca were nothing more "than conversations between conspirators that did nothing to advance the aims of the alleged conspiracy." *Id.* at 521. The court detailed some of the declarations compelling this conclusion. The statements pertained to events that had already occurred, such as that other conspirators had been unable to pick up heroin, and narrative as to what Gonzales himself planned to do. *Id.* at 520. There was not indication that Gonzales' actions were shaped by his talks with Baca. Similarly, there was no indication that Baca acted on behalf of the conspiracy as a result of these conversations.

In the case at bar, Delbert First and Robert First were in business together; therefore, they shared more than familial ties. After Robert told Delbert about the March 5, 1979, meeting, they actively solicited a donation for the legislative fund. Because this joint solicitation effort followed closely Robert's discussion of the meeting with his brother, that declaration can be viewed as being in furtherance of the conspiracy. It is readily distinguishable from the situation in *Eubanks*, in which Gonzales' conversations with Baca apparently prompted no action on her part nor any action by Gonzales that he had not already planned to take.

The Government cites no specific actions by either Delbert or Robert following the March 26, 1979, meeting

that were arguably prompted by their discussion. Because the brothers had previously engaged in joint action furthering the goals of the conspiracy, however, there was a reasonable basis for the trial judge's conclusion that the evidence was admissible pursuant to rule 801(d)(2)(E). *See United States v. Inendino*, 604 F.2d 458, 461 (7th Cir. 1979) (per curiam), *cert. denied*, 449 U.S. 844 (1980); *United States v. Markey*, 571 F.2d 376, 383 (7th Cir. 1978).

We conclude that the trial judge properly admitted Delbert First's testimony pursuant to the joint venture exception. We note additionally that, even if the judge below had admitted the evidence pertaining to the March 26, 1979, meeting without sufficient basis, Kendall was not prejudiced. Leslie, Lee, and Patchett all testified at trial concerning Kendall's involvement in that meeting. All three recalled discussion in Kendall's presence as to how the $9,000 previously raised had been spent, the possibility of further payments to secure favorable membership on the proposed legislative study commission, and Kendall's remarks concerning his influence with the Senate.

The appellant also contends that his right to confrontation was abrogated by admission of Delbert First's testimony because he could not cross-examine Robert First. This court has previously held that extrajudicial statements properly admissible under rule 801(d)(2)(E) do not violate a defendant's sixth amendment rights. *United States v. Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977). The trial court therefore did not err in admitting the testimony of Delbert First.

C. "During the Course of" the Conspiracy

Kendall contends that Harris' testimony regarding a conversation with Cline on May 10, 1979, was improperly admitted. He argues that the conspiracy alleged in the indictment had as its aim the securing of favorable action on specified bills during the Spring, 1979, legislative

session. According to the appellant, the conspiracy necessarily ended on March 16, 1979, when the Senate passed House Bill 1490 without the amendment favored by the ISAA. Because the conspiracy ended before the May 10, 1979, conversation, testimony regarding the telephone call did not meet the requirement of rule 801(d)(2)(E) that the declaration be in furtherance of the conspiracy.

As discussed in more detail in Section IV, *infra*, we find that the judge below did not err in finding a single conspiracy that ended only when the ISAA refused to take any further action following the May 10, 1979, telephone call. This call therefore was made in order to further the conspiracy and the evidence was properly admitted pursuant to the joint venture exception.

III. Bill of Particulars

The appellant argues the trial judge abused his discretion in denying Kendall's motion for a bill of particulars identifying the known but unnamed co-conspirators. Kendall's reasoning is as follows. The indictment charged a conspiracy to extort, naming ISAA members as victims. There was no conspiracy to bribe charged in the indictment. Because it was a legal impossibility for the ISAA members to be co-conspirators as to the section 1951 charge, Kendall had no way of knowing the identity of these unnamed co-conspirators. Further, the appellant had no notice of the Government's legal theory through discovery pursuant to rule 16 of the Federal Rules of Criminal Procedure because the Government actively misled Kendall into thinking that testimony concerning conversations among ISAA members was intended only to show the victim's state of mind. Kendall urges that the trial court's abuse of discretion is obvious from a statement made by the judge below during trial that "the court can only assume that those individuals [the defendants] are well acquainted with all their associates and all the persons who participated in

the conspiratorial undertaking." According to the appellant, this assumption is improper because it is inconsistent with the presumption of innocence.

It is well established that a motion for a bill of particulars lies within the discretion of the trial court. *United States v. Barrett*, 505 F.2d 1091, 1106 (7th Cir. 1974), *cert. denied*, 421 U.S. 964 (1975); *United States v. Cansler* 419 F.2d 952, 954 (7th Cir. 1969), *cert. denied*, 397 U.S. 1029 (1970). The denial of such a motion is reviewable only as an abuse of discretion. *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979), *cert. denied*, 444 U.S. 979.[10] The test for whether a bill of particulars is necessary is "whether the indictment sets forth the elements of the *offense charged* and sufficiently apprises the defendant of the *charges* to enable him to prepare for trial." *United States v. Roya*, 574 F.2d 386, 391 (7th Cir. 1978) (emphasis added), *cert. denied*, 439 U.S. 857.

In *Roya*, this court found that an indictment setting forth the elements of each offense charged, the time and place of the defendant's conduct that violated that offense, and citation to the statute or statutes violated satisfied the requirement. *Id.* Kendall does not complain that the indictment in the instant case failed to meet these criteria. His argument is essentially that he was prejudiced because he did not know the evidentiary theory on which the Government would rely. Kendall's reference to the district judge's statement, upon denial of his motion, suggests that we should find an abuse of discretion if the judge relied in part on an impermissible reason for his denial, even if the defendant was not prejudiced thereby.

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[10] In his brief the appellant cites decisions, *e.g.*, *United States v. Hubbard*, 474 F. Supp. 64, 81 (D.D.C. 1979), in which the district judge has granted a motion for a bill of particulars identifying known but unnamed co-conspirators. That trial judges have, in their discretion, granted such motions is not determinative of whether the judge in the case at bar abused his discretion in denying the motion.

We do not find this theory consistent with Roya but, in any event, we do not construe the remarks of the judge below as abrogating the presumption of innocence. We therefore must consider whether a defendant is precluded from adequately preparing for trial when he is not aware that the testimony of certain witnesses will likely be admitted pursuant to rule 801(d)(2)(E).

It is established that "a defendant is not entitled to know all the *evidence* the government intends to produce, but only the *theory* of the government's case." *United States v. Giese*, 597 F.2d 1170, 1181 (9th Cir. 1979) (quoting *Yeargain v. United States*, 314 F.2d 881, 882 (9th Cir. 1963) (per curiam), *cert. denied*, 444 U.S. 979); *United States v. Johnson*, 504 F.2d 622, 628 (7th Cir. 1974). In the instant case, as in *Giese*, the defendant in fact knew of the evidence on which the Government intended to rely. The tape recording of the March 5, 1979, meeting and the transcript thereof, for instance, had been provided Kendall during discovery. The only thing of which Kendall can complain is that he was unaware of the purpose for which the Government would seek to introduce these evidentiary materials.

We are not persuaded that a defendant who has *no* right to know the details of the evidence to be introduced by the Government does have a right to know for what purpose the Government will seek to have it admitted. The defendant's constitutional right is to know the offense with which he is charged, not to know the details of how it will be proved. *United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1348 (1981). Further, the appellant's contention is inconsistent with the established rule that the joint venture exception is available at trial even though no conspiracy is charged in the indictment. *E.g., United States v. Gil*, 604 F.2d 546, 549 (7th Cir. 1979). A defendant who is not charged with conspiracy does not know before trial that the Government will rely on rule 801(d)(2)(E); yet, courts have found that this does not prejudice the defendant.

In this case, Kendall not only knew of the evidence on which the Government intended to rely. He also knew that the Government anticipated introducing evidence pursuant to the joint venture exception. The brief submitted by the Government prior to trial included a discussion of the relevant law pertaining to rule 801(d)(2)(E) and included reference to the *Hathaway* case which we have found persuasive in our disposition of the appellant's argument in Section II, *supra*. It is true that the Government's brief discusses the state of mind exception at greater length and more directly in relation to the admissibility of the conversations among ISAA members, whereas the discussion of rule 801(d)(2)(E) is somewhat more abstract. We find, however, that the brief as a whole, together with the evidentiary materials made available to Kendall and the indictment itself, more than satisfy the requirements of *Roya*.

We find therefore that the judge below acted well within his discretion in denying Kendall's motion for a bill of particulars.

IV. Instruction Regarding Multiple Conspiracies

Appellant Kendall also maintains that the district judge erred by refusing to instruct the jury as to the possibility of multiple conspiracies. The defendant argues that the charged conspiracy related only to efforts to influence the passage of bills before the legislature prior to March 16, 1979. When House Bill 1490 was passed by the Senate, without the amendment favored by the ISAA, on March 16, 1979, the charged conspiracy was terminated. The March 26, 1979, meeting was not therefore part of the conspiracy. Kendall contends that this later meeting might have been found to constitute a distinct conspiracy. The evidence linking Kendall to the March 26, 1979, meeting was allegedly stronger than that linking him to the earlier extortion conspiracy. If two separate conspiracies existed, the jury might have found him guilty of the later but not the

earlier one. He was therefore prejudiced by the trial court's failure to instruct the jury regarding multiple conspiracies.

If the possibility of multiple conspiracies exists, the trial judge must so instruct the jury. *See United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040. The difficulty lies in determining whether such a possibility indeed exists in a given case. One must look to the nature of the agreement. *Id.* at 742. If the persons join together to further one common design or purpose, a single conspiracy exists. A multiple conspiracy, by contrast, exists when there are separate agreements to effectuate distinct purposes. A multiple conspiracy is more likely to be mistaken for a single conspiracy when one or two "core" defendants agree with other "non-core" defendants to accomplish a series of similar transactions. In such a case one could reasonably infer that the non-core defendants had agreed either to the overall scheme or merely to one distinct transaction. If a non-core defendant has not agreed to the scheme in its entirety, he should not be charged with all the actions contemplated by the core defendants. It is this determination that is left to the jury and is furthered by a jury instruction regarding multiple conspiracies.

In *Varelli*, for instance, the defendants had been convicted of a single conspiracy to hijack interstate shipments of merchandise. The evidence had shown one hijacking of Polaroid film and three hijackings of silver. Each transaction occurred on a different date. A panel of this court held that there was insufficient evidence from which a jury could find a single conspiracy, *id.* at 744, stating:

> While some of the parties who took part in the Polaroid hijacking were also involved in the silver hijackings, this alone is insufficient to support a finding of one overall continuous conspiracy. The conspirators in the Polaroid hijacking did not contemplate a series of hijackings in which all would partake. Rather, the

> Polaroid hijackings represented a single transaction with a single purpose. The fact that the object in both the Polaroid hijacking and silver hijackings were similar is insufficient to constitute an overall common conspiracy.

Id. (citation omitted). *See Kotteakos v. United States*, 328 U.S. 750 (1946); *Barnard v. United States*, 342 F.2d 309 (9th Cir. 1965), *cert. denied*, 382 U.S. 948.

Contrary to the appellant's interpretation, the Superseding Indictment was not clearly limited to the time during which the 101st General Assembly was considering Senate Bills 155 and 256 and House Bill 1490. Paragraph 13, Count I, of the indictment alleges a conspiracy "[f]rom on or about January 15, 1979, to the date of this Indictment." The purpose of the ISAA was broader than the scope of those particular bills; the association sought throughout its existence to effect favorable bail bond legislation. The March 26, 1979, meeting demonstrated that the defendants were continuing their efforts to further the overall scheme of obtaining favorable legislation. The temporary set-back to the conspiracy, caused by the passage of House Bill 1490 on March 16, 1979, without the amendment favored by ISAA, did not signal an end to the conspiracy. The discussion at the March 26, 1979, meeting concerning the $9,000 previously paid to Edwards furthers the conclusion that this was one continuing conspiracy.

Considering the evidence in a light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), there is sufficient support for Kendall's involvement in the single conspiracy. There is no evidence that Kendall initially suggested illegal activity. At least as early as March 10, 1979, however, he received a $1,000 share of the illegal payment made to Edwards. He knew the source and purpose of the payment. At the March 26, 1979, meeting, Kendall was present when the previous payments made to Edwards were discussed. Assuming, arguendo, that Kendall did not become part of the conspiracy until he

received the $1,000 kickback, "he is [nonetheless] chargeable with whatever was said or done previously by his co-conspirators." *United States v. Cerrito*, 413 F.2d 1270, 1272 (7th Cir. 1969), *cert. denied*, 369 U.S. 1004 (1970).

As this court has previously noted, "in nearly every conspiracy case the claim is made that a variance exists because multiple conspiracies were shown." *United States v. Abraham*, 541 F.2d 1234, 1238 (7th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977). The trial judge is in the best position to determine whether the possibility of a variance exists, *id.* at 1239. We conclude that the judge below did not err in refusing to instruct the jury on multiple conspiracies.

V. Severance

Kendall argues that the trial court erred in denying his motions for severance. The appellant claims specifically that he was prejudiced by the admission of impeachment evidence against Edwards and by admission of the recording of a telephone conversation between Edwards and Cline that took place on May 12, 1980. Before and during presentation of the impeachment evidence, the court instructed the jury that the testimony was not to be regarded in weighing the evidence against Kendall. Similarly, when the recording of the Cline/Edwards conversation was admitted, the court explicitly told the jury to disregard the conversation in relation to Kendall. At the close of the case, the judge again instructed the jury, stating:

> In this connection, you should keep in mind the cautionary instructions which the court has from time to time given you throughout the course of the trial regarding the application of evidence to one defendant and not the other.

Kendall claims that the interim instructions were insufficient to prevent prejudice against him. He further

argues that, even if the interim instructions were adequate, the instructions at the close of the case were deficient because they failed to alert the jury specifically to what evidence was admitted only against Edwards.

The decision as to whether a motion for severance should be granted lies within the discretion of the trial judge. *Opper v. United States*, 348 U.S. 84, 85 (1954). It is subject to review only upon a showing of a clear abuse of discretion.[11]

Severance need only be granted if the moving party demonstrates that a "fair trial cannot be had without severance, not merely that a separate trial offers a better chance for acquittal." *United States v. Holleman*, 575 F.2d 139, 142 (7th Cir. 1978); *accord, United States v. Papia*, 560 F.2d 827, 836 (7th Cir. 1977); *United States v. Abraham*, 541 F.2d 1234, 1240 (7th Cir. 1976). Because there is a strong public interest in having persons jointly indicted tried together, *United States v. Papia*, 560 F.2d 827, 837 (7th Cir. 1977), the ultimate question is whether the jury can follow the court's limiting instructions so as not to attribute evidence to a defendant against whom it is inadmissible. *Id.*

Appellant's arguments for severance are readily distinguishable from those that led the Second Circuit to conclude that severance should have been granted in *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), *cert. denied*, 384 U.S. 942 (1966). The Second Circuit court initially noted that "there would seem to have been nothing in the papers submitted or the arguments advanced when the trial commenced to justify a holding by us that the denial of Shuck's motion for a severance was an abuse of judicial discretion...." *Id.* at 759. The prejudice to Shuck became apparent only later when the trial extended over a

[11] *United States v. Hedman*, 630 F.2d 1184, 1200 (7th Cir. 1980); *United States v. Grabiec*, 563 F.2d 313, 318 (7th Cir. 1977); *United States v. Papia*, 560 F.2d 827, 836 (7th Cir. 1977); *United States v. Tanner*, 471 F.2d 128, 137 (7th Cir. 1972), *cert. denied*, 412 U.S. 929 (1973).

longer period than the two to three month estimate originally given to the jurors. Shuck's name was not even mentioned during the first three months of the trial. During those months, however, there was a "slow but inexorable accumulation of evidence" against Shuck's co-defendants that "must have stamped them in the eyes of the jurors as unscrupulous swindlers of the first rate." *Id.* The jurors were irritated by the length of the trial, and the appellate court thought that they might have held Shuck, who had been ill, responsible. In contrast, the Kendall/Edwards trial lasted just over a month, and there was no evidence that the jury was antagonistic towards Kendall because of the trial's duration.

It is established that a disparity of incriminating evidence is not in itself sufficient to establish prejudice, *United States v. Hedman*, 630 F.2d 1184, 1200 (7th Cir. 1980); *United States v. Grabiec*, 563 F.2d 313, 318-19 (7th Cir. 1977). Although there was some disparity between the amount of evidence presented against Edwards and that relevant to Kendall, we do not find that severance was required.

The *Kelly* court noted that an alternative method of guarding against prejudice is to give interim limiting instructions, coupled with "positive and clear instructions at the close of the case," 349 F.2d at 757, to the jury. Kendall maintains that the court's instructions to the jury, particularly those given at the close of the case, failed to meet the *Kelly* standard. The purpose of requiring "positive and clear instructions" is to ensure that the jury is able to apply the court's directions, thereby eliminating prejudice to the defendant. *See United States v. Papia*, 560 F.2d 827, 837 (7th Cir. 1977). We must inquire therefore whether the instructions given by the judge below were sufficiently clear for the jury to follow, so that evidence relative only to Edwards would not be attributed to Kendall.

We find that the interim instructions were quite explicit. We are not willing to speculate that the jurors ignored these

clear instructions. *See Opper v. United States*, 348 U.S. 84, 95 (1954), *quoted in United States v. Papia*, 560 F.2d 827, 837 (7th Cir. 1977). Although Judge Steckler's instruction at the close of the case did not enumerate once again the evidence that was inadmissible against Kendall, the instruction referred specifically to the earlier detailed instructions. We do not find any likelihood of jury confusion. In our view, the record does not establish either that severance was required or that the instructions given by the court were ineffective to avoid prejudice to Kendall.

In light of our conclusions that the trial judge did not err in relying on rule 801(d)(2)(E), in denying the defendant's motion for a bill of particulars, in refusing to instruct the jury as to the possibility of multiple conspiracies, or in denying Kendall's motions for severance, the conviction of Francis B. Kendall is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

November 23, 1981

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 81-1138 vs.	)
	) No. 80-CR-74
FRANCIS B. KENDALL, *Defendant-Appellant.*	) Judge William E. Steckler

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

December 24, 1981

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 81-1138 vs.	)
	) No. IP 80-74-CR
FRANCIS B. KENDALL, *Defendant-Appellant.*	) William E. Steckler, *Chief District Judge.*

ORDER

IT IS ORDERED by this Court, *sua sponte*, that its opinion of November 23, 1981, in the above-entitled matter, be amended to read as follows:

On page 17 of the slip opinion, in paragraph 2, the sentences reading as follows:

> A multiple conspiracy, by contrast, exists when there are separate agreements to effectuate distinct purposes. A multiple conspiracy is more likely to be mistaken for a single conspiracy when one or two "core defendants agree with other "non-core" defendants to accomplish a series of similar transactions.

are amended to read as follows:

> Multiple conspiracies, by contrast, exist when there are separate agreements to effectuate distinct purposes. Multiple conspiracies are more likely to be mistaken for a single conspiracy when one or two "core" defendants agree with other "non-core" defendants to accomplish a series of similar transactions.

December 28, 1981

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	) Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 81-1138 vs.	)
	) No. IP 80-74-CR
FRANCIS B. KENDALL, *Defendant-Appellant.*	) William E. Steckler, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Francis B. Kendall, defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES OF AMERICA	)	
	)	
v.	)	NO. IP 80-74-CR
	)	
MARTIN K. EDWARDS and FRANCIS B. KENDALL	)	

SUPERSEDING INDICTMENT

COUNT 1

The Grand Jury charges that:

1. At all times relevant herein, there existed pursuant to the Indiana Constitution, the General Assembly of the State of Indiana, composed of the Senate and the House of Representatives of the State of Indiana.

2. At all times relevant herein, MARTIN K. EDWARDS was an elected member of the General Assembly of the State of Indiana, that is, a member of the Senate, and served as President *Pro Tempore* of that body, and, as President *Pro Tempore* of that body had the authority to and in fact did: (a) make and announce appointments to the standing committees of the Senate, (b) assign bills and resolutions to the various standing committees, and (c) sign enrolled acts.

3. At all times relevant herein, MARTIN K. EDWARDS was a member of the following standing committees of the Indiana Senate: Elections, Judiciary and Rules, and he was also Chairman of the Courts and Criminal Code Subcommittee of the Judiciary Committee.

4. At all times relevant herein, Senate Bills 155 and 256 and House Bill 1490 were legislative matters considered during the First Regular Session of the 101st General

Assembly of the State of Indiana, which bills all concerned bail and recognizance in the State of Indiana.

5. At all times relevant herein, there existed the Indiana Surety Agents Association, which association's membership consisted of licensed bailbondsmen who did business throughout the State of Indiana. Many of its members were agents for insurance and bonding companies with offices and headquarters located outside the State of Indiana, including but not limited to, Allegheny Mutual Casualty Company of Pennsylvania and Accredited Surety and Casualty Company of Florida. Furthermore, the aforementioned members of the Indiana Surety Agents Association, as licensed bailbondsmen, did engage in the performance of services in interstate commerce, and did perform services for organizations doing business in interstate commerce which resulted in the transfer of moneys, materials, supplies and persons in interstate commerce. Furthermore, the members of the Indiana Surety Agents Association contributed varying amounts of money to the Indiana Surety Agents Association to be used to influence the legislative bills mentioned in paragraph 4.

6. At all times relevant herein, Bruce T. Harris, Logansport, Indiana, was President of the Indiana Surety Agents Association.

7. At all times relevant herein, FRANCIS B. KENDALL was the President of Capitol Business Systems, Inc., 1407 East Merchants Plaza, Indianapolis, Indiana, an Indiana corporation.

8. At all times relevant herein, JOHN L. CLINE was an associate of FRANCIS B. KENDALL at Capitol Business Systems, Inc.

9. At all times relevant herein, the Indiana Surety Agents Association by and through Bruce T. Harris and other members thereof, including but not limited to Jack Lee, Donald Leslie, and Gary Patchett, desired to influence

the passage of the bills mentioned in paragraph 4, as it was their belief that the passage of these bills would have a favorable financial and economic effect on the bailbondsmen members of the Indiana Surety Agents Association.

10. At all times relevant herein, the Indiana Surety Agents Association, its officers, members and agents had an agreement with FRANCIS B. KENDALL and JOHN L. CLINE of Capitol Business Systems, Inc., whereby Capitol Business Systems, Inc. was to influence the passage of the bills mentioned in paragraph 4 of this count of the indictment.

11. Accordingly, MARTIN K. EDWARDS had and was reasonably understood by FRANCIS B. KENDALL, JOHN L. CLINE, Bruce T. Harris, and other members of the Indiana Surety Agents Association to have the power as a member of the Senate of the 101st General Assembly of the State of Indiana, and as President *Pro Tempore* of that same body to take action, which actions could favorably affect the passage of the bills mentioned in paragraph 4.

12. At all times relevant herein, MARTIN K. EDWARDS did use his office as an elected member of the 101st General Assembly of the State of Indiana and President *Pro Tempore* of the Senate to extort certain sums of money from the Indiana Surety Agents Association, its officers, members and agents, in concert with FRANCIS B. KENDALL and JOHN L. CLINE of Capitol Business Systems, Inc. by creating the reasonable understanding on the part of the Indiana Surety Agents Association, its officers, members and agents that he, MARTIN K. EDWARDS, would favorably influence the passage of bills mentioned in paragraph 4 of this indictment if the members of the Indiana Surety Agents Association, its officers, members and agents paid extorted sums of money to MARTIN K. EDWARDS.

13. From on or about January 15, 1979, to the date of this Indictment, in the Southern District of Indiana, and

elsewhere, JOHN L. CLINE, MARTIN K. EDWARDS and FRANCIS B. KENDALL and others known and unknown to the Grand Jury, did knowingly, willfully and unlawfully conspire, confederate and agree together and with each other to obstruct, delay, and affect interstate commerce by extortion as the terms commerce and extortion are defined in the United States Code, Title 18, Section 1951, that is to say that the defendants, JOHN L. CLINE, MARTIN K. EDWARDS, FRANCIS B. KENDALL, and others known and unknown to the Grand Jury, conspired and agreed together that the said defendant, MARTIN K. EDWARDS, would unlawfully obtain and cause to be obtained property, to wit: money in the form of Eight Thousand Dollars and No Cents ($8,000.00) more or less, which money was not due the defendant, MARTIN K. EDWARDS, in his capacity as President *Pro Tempore* and member of the Senate of the General Assembly of the State of Indiana, from the Indiana Surety Agents Association, its officers, members and agents, with the consent of the Indiana Surety Agents Association, its officers, members and agents, said consent having been obtained through the wrongful use of fear of financial and economic injury and under the color of official right; in that the Indiana Surety Agents Association, its officers, members and agents, did believe that they could obtain favorable influence on the bills mentioned in paragraph 4, if they agreed to and did pay moneys to MARTIN K. EDWARDS in his capacity as President *Pro Tempore* and member of the Senate of the General Assembly of the State of Indiana.

In furtherance of the conspiracy, and to effect the objects thereof, defendants did commit, among others, the following overt acts in the Southern District of Indiana and elsewhere:

OVERT ACTS

1. On or about the latter part of January, 1979, or early part of February, 1979, Bruce T. Harris and FRANCIS B. KENDALL met at the office of Capitol Business Systems, Inc., at Indianapolis, and discussed bail bonding legislation.

2. Subsequent to the events in Overt Act 1, but on that same day, FRANCIS B. KENDALL introduced Bruce T. Harris to JOHN L. CLINE.

3. On or about February 7, 1979, Bruce T. Harris, on behalf of the Indiana Surety Agents Association, delivered $1,000 cash to Capitol Business Systems, Inc., at Indianapolis, following the instructions given to Harris by Kendall in the meeting and discussion described in Overt Act 1.

4. On or about February 28, 1979, JOHN L. CLINE introduced Bruce T. Harris to MARTIN K. EDWARDS at the Mecca Club at Indianapolis, Indiana.

5. On or about March 1, 1979, MARTIN K. EDWARDS furnished JOHN L. CLINE with a payment schedule to be followed by Bruce T. Harris, on behalf of the Indiana Surety Agents Association, to move the bail bonding bills through the General Assembly of the State of Indiana.

6. On or about the same date as in Overt Act 5, March 1, 1979, JOHN L. CLINE furnished the payment schedule mentioned in Overt Act 5 to Bruce T. Harris.

7. On or about March 2, 1979, Bruce T. Harris delivered $3,000 cash to JOHN L. CLINE at Capitol Business Systems, Inc., Indianapolis, Indiana.

8. On or about March 2, 1979, JOHN L. CLINE delivered $3,000 cash to MARTIN K. EDWARDS at EDWARDS' State House Office, Indianapolis, Indiana.

9. On or about March 5, 1979, Bruce T. Harris held a meeting of the Indiana Surety Agents Association, at the

Hyatt Regency Hotel, Indianapolis, Indiana, wherein he discussed with members of the Executive Committee of the Indiana Surety Agents Association the payment schedule of moneys paid and to be paid to MARTIN K. EDWARDS mentioned in Overt Acts 5 and 6.

10. On or about March 7, 1979, Bruce T. Harris delivered $5,000 to JOHN L. CLINE at Capitol Business Systems, Inc., Indianapolis, Indiana.

11. On or about March 7, 1979, JOHN L. CLINE delivered $5,000 cash to MARTIN K. EDWARDS, at EDWARDS' State House Office, Indianapolis, Indiana.

12. On or about March 7, 1979, MARTIN K. EDWARDS returned $2,000 of the $5,000 to JOHN L. CLINE.

13. On or about March 7, 1979, JOHN L. CLINE gave $1,000 of the $2,000 returned to him by MARTIN K. EDWARDS, to FRANCIS B. KENDALL.

14. On or about March 26, 1979, FRANCIS B. KENDALL, JOHN L. CLINE, Bruce T. Harris and other members of the Indiana Surety Agents Association, met at Indianapolis at the offices of Capitol Business Systems, Inc. to discuss bail bonding bills and the possibility of obtaining, in exchange for moneys, favorable appointments to an Interim Study Committee, which was to study the bail bonding issue between the First Regular Session and the Second Regular Session of the 101st General Assembly of the State of Indiana.

All in violation of Title 18, United States Code, Section 1951.

COUNT 2

The Grand Jury further charges that:

1. Paragraphs 1 through 12 of Count 1 are hereby realleged and hereby incorporated by reference as if fully set forth herein.

2. On or about March 2, 1979, in the Southern District of Indiana, and elsewhere, MARTIN K. EDWARDS with the aid of JOHN L. CLINE and FRANCIS B. KENDALL and others, known and unknown to the Grand Jury did knowingly, willfully and unlawfully obstruct, delay, affect and potentially affect interstate commerce by extortion and attempt to obstruct, delay, affect and potentially affect interstate commerce by extortion as the terms commerce and extortion are defined by Section 1951 of Title 18, United States Code, in that MARTIN K. EDWARDS with the aid of JOHN L. CLINE and FRANCIS B. KENDALL, did obtain directly and indirectly, property to wit: money in the form of Three Thousand Dollars and No Cents ($3,000.00) more or less, which money was not due the defendant, MARTIN K. EDWARDS in his capacity of President *Pro Tempore* and member of the Senate of the General Assembly of the State of Indiana from the Indiana Surety Agents Association, its officers, members and agents, with the consent of the Indiana Surety Agents Association, its officers, members and agents, said consent having been obtained through the wrongful use of fear of financial and economic injury and under the color of official right; in that the Indiana Surety Agents Association, its officers, members and agents did believe that they would obtain favorable influence on the bills mentioned in paragraph 4 of Count 1 of this indictment, the passage of which bills would have had a financial and economic affect on the member bailbondsmen of the Indiana Surety Agents Association, if they agreed to and did pay moneys to MARTIN K. EDWARDS in his capacity as President *Pro Tempore* and member of the Senate of the General Assembly of the State of Indiana, in violation of Title 18, United States Code, Section 1951.

COUNT 3

The Grand Jury further charges that:

1. Paragraphs 1 through 12 of Count 1 are hereby realleged and hereby incorporated by reference as if fully set forth herein.

2. On or about March 7, 1979, in the Southern District of Indiana, and elsewhere, MARTIN K. EDWARDS with the said of JOHN L. CLINE and FRANCIS B. KENDALL and others, known and unknown to the Grand Jury did knowingly, willfully and unlawfully obstruct, delay, affect and potentially affect interstate commerce by extortion and attempt to obstruct, delay, affect and potentially affect interstate commerce by extortion as the terms commerce and extortion are defined by Section 1951 of Title 18, United States Code, in that MARTIN K. EDWARDS with the aid of JOHN L. CLINE and FRANCIS B. KENDALL, did obtain directly and indirectly, property to wit: money in the form of Five Thousand Dollars and No Cents ($5,000.00) more or less, which money was not due the defendant, MARTIN K. EDWARDS in his capacity of President *Pro Tempore* and member of the Senate of the General Assembly of the State of Indiana from the Indiana Surety Agents Association, its officers, members and agents, with the consent of the Indiana Surety Agents Association, its officers, members and agents, said consent having been obtained through the wrongful use of fear of financial and economic injury and under the color of official right; in that the Indiana Surety Agents Association, its officers, members and agents did believe that they would obtain favorable influence on the bills mentioned in paragraph 4 of Count 1 of this indictment, the passage of which bills would have had a financial and economic affect on the member bailbondsmen of the Indiana Surety Agents Association, if they agreed to and did pay moneys to MARTIN K. EDWARDS in his capacity as President *Pro Tempore* and member of the Senate of the General Assembly of the State of Indiana, in violation of Title 18, United States Code, Section 1951.